Supreme Court, U.S.
FILED

09-693 DEC 7 - 2009

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No.:

IN THE

Supreme Court of the United States

WILLIAM KYLE, KATHRYN GILBERT, AND MARY KYLE,

Petitioners,

v.

HON. GERALD LEBOVITS, (JHC), AND 736 RIVERSIDE DR., LLC.,

Respondents.

On Petition for a Writ of Certiorari To the State of New York Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is there a 14th Amendment minimum standard of judicial conduct for "actual bias" disqualification? Respondent Judge Lebovits refused to perform 15 statutory mandates governing New York City Housing Court disputes. When sued in mandamus, Respondent, *ex parte*, disparaged Petitioners' counsel to his adversary "as needing a psychiatrist," whose legal work is "crap [he] wouldn't wish on [his] worst enemy" and later threatened him with disciplinary charges. Admitting a "serious ethical conundrum," Respondent signed the Order dismissing the first mandamus against him,[1] then recused himself, but continued to conduct hearings. Post-recusal, Respondent accused Petitioners' counsel of "lying;" threw a court file at him and surrounded him with armed court officers "in case you get out of line." Petitioners filed this mandamus for disqualification, which was dismissed. The court then imposed sanctions on counsel. Did Respondent's post-recusal participation, his conduct and his failure to disqualify himself—despite abundant evidence of actual bias—violate the 14th Amendment.[2]

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[1] Respondent Judge was sued twice for mandamus. His actual bias became apparent after he was served with the first mandamus complaint. The second mandamus suit is the subject of this application.

[2] Pursuant to Rule 14-1(a), Petitioners also seek reversal of the sanctions imposed upon counsel, per 28 U.S.C. §2106.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, William Kyle, Kathryn Gilbert, and Mary Kyle, respectfully submit this petition for a writ of certiorari to review the judgment of the New York State Court of Appeals.

OPINIONS BELOW

The opinion of the Court of Appeals of New York is not yet published but is electronically available at WL 2871192. Pet. App. 1a. Respondent Judge Lebovits' initial order of recusal and subsequent order declining to disqualify himself are not reported.[1] *Id.* at 37a. The opinion of the New York State Supreme Court denying Petitioners' Mandamus petition for disqualification is electronically available at WL 3275204. *Id.* at 65a.

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[1] As discussed *infra*, (p.15), On June 20, 2007, Lebovits initially recused himself by writing on the file jacket: "I recuse myself." Pet. App. 121a – 123a, also see 41a *fn*.1. , immediately after Respondent Judge so-ordered a stipulation which terminated a mandamus action against him. Subsequently, Respondent Judge conducted at least two hearings and issued three decisions, all post-recusal. These orders denied Petitioners' motions for vacatur and disqualification. The post-recusal orders also accused Petitioners and their counsel of misconduct and scheduled a sanctions hearing. *Id.*, 12a, 17a, 28a. After recusing himself, Respondent issued an opinion finding attorney Kyle guilty of "trying to manipulate the system of justice in an egregious, unethical way," by bringing "a [mandamus] instead of appealing." *Id.*, 38-a.

And the opinion of the First Department of the Appellate Division affirming the Supreme Court's dismissal is electronically available at WL 3275204. *Id.* at 65a.

JURISDICTION

The State of New York Court of Appeals entered judgment on September 8, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a) and 28 U.S.C. §2106.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part: No State shall . . . deprive any person of life liberty or property without due process of law. . .
U.S. Cont. Amend. XIV, §1.

STATEMENT

This case involves a mandamus action for disqualification arising out of a New York City Housing Court dispute.[2] The underlying litigation

[2] Respondent Judge was sued twice in mandamus, his actual bias became apparent after he was served with the first which sought his compliance with requirements of New York's *Real Property and Procedural Law* (RPAPL §745[1]), mandating immediate trial on Petitioners' counterclaim. The second

stems from the uninhabitable conditions of Petitioners' apartment, located in the Harlem section of Manhattan in a building owned by their landlord, co-Respondent 736 Riverside Dr. LLC., ("Riverside"). Riverside—having lost multiple law suits to Petitioners between 1998 and 2005—was indebted to Petitioners for costs and attorneys fees. Under New York Law (Real Property Law ["RPL"] §234), those victories entitled Petitioners to a substantial counterclaim for *statutory* cost and fees in excess of $400,000.00. In 2006, Riverside filed yet another suit against Petitioners. Petitioners' verified counterclaim sought recovery of: "§234 attorneys' fees, costs and disbursements . . . retroactive to the date of incurrence."[3]

[Footnote continued from previous page]

mandamus suit, the necessity of which is explained within, is the subject of this application.

[3] RPL §234 provides in pertinent part:

> . . . there shall be implied in [a residential] lease a covenant by the landlord to pay the reasonable attorney's fees and/or expenses incurred by the tenants . . . in the *successful defense of any action commenced by the landlord against the tenant arising out of the lease*, and an agreement that such fees and expenses may be recovered as provided by law in an action commenced against the landlord or *by way of counterclaim in any action* or summary proceeding commenced by the landlord against the tenant.

The facts are not in dispute. While presiding over this housing litigation, Respondent Judge violated 15 mandatory legislative enactments by erecting artificial procedures to prevent a trial on Petitioners' §234 counterclaim.[4] Respondent never denied his failure to comply with the 15 statutory mandates. To compel compliance with those provisions, Petitioners filed their first mandamus.

Three weeks after being served with the Mandamus Order to Show Cause, Respondent admitted his "serious ethical conundrum" and recused himself based upon the "strong feelings the [mandamus] engendered." Pet. App. 30a. Yet, after being served with the second mandamus petition (for retroactive disqualification), Respondent in effect, un-recused himself, by holding two hearings,[5] issuing three decisions, post recusal:[6]

THE COURT: *But I recused myself from [this] case.*

* * *

THE COURT: *. . . Okay. So now that I have recused myself, thank you very much. . . .*

MR. KYLE: *. . . Now if you have recused yourself, then I'm at a loss as to why we're having this colloquy. I mean if you've*

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[4] Pet. App. 3a - 9a

[5] *Id.*, 99a – 103a; 117a – 138a

[6] *Id.*, 12a, 17a, 28a.

recused yourself and—and you can't hear the matter any more—then why am I standing in front of you?

THE COURT: *Because—*

MR. KYLE: *—being essentially accused of "lying", being accused of being "slippery", and having files thrown at me? I don't understand this, Your Honor.*

THE COURT: *All right.* * * *

MR. KYLE: *So apparently you are proceeding on the case even though you have recused yourself, be cause I filed a Motion. Am I correct?*

THE COURT: *I get to ask the questions. You get to give the answers.*

Pet. App. 121a -122a.

The foregoing colloquy confirms Justice Thomas F. Liotti's conclusion that, "the system of recusal [in New York] is *deliberately* flawed because [its] judiciary wishes to discourage recusal motions by a process of *systemic intimidation* wherein it considers such motions to be a monkey wrench thrown into the works of its turnstile." Emphasis

added, *People v. T & C Design, Inc.*, 178 Misc.2d 971, 680 N.Y.S.2d 832, 1998 N.Y. Slip Op. 98641 (N.Y. Just. Ct., 1998). This "*deliberately* flawed process . . . of *systemic intimidation*" is as much in place today as when Justice Liotti lamented it in 1998. The public record of Respondent Judge Lebovits' uncontroverted bias, prejudicial and intemperate conduct culminating in near physical assault, has withstood four levels of judicial review.

Indeed, the penalty for having raised the issue has been the imposition of a $1000.00 sanction against the attorney seeking disqualification. The sanction was imposed, in an effort to "sting sufficiently," (Pet App. 58a), confirming the fears of Justice Liotti: to *discourage recusal motions by systemic intimidation. T & C Design, (supra)* at 975. These perfunctory "appellate" decisions prove Judge Lebovits' conduct—even if atypical—is overlooked, if not condoned by New York's recusal system. [7]

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[7] Recusal is the "trigger few trial lawyers ever want to pull. To state the obvious, a party risks offending or angering a judge by asking him to recuse himself, and a motion to recuse is rarely successful before the presiding judge or on appeal." *Litigation News: From the ABA Section of Litigation*: "Wrestling with the Judge Who Wants You to Settle" Campbell Killefer. Missouri State Supreme Court Judge Michael A. Wolff cautions: "If you don't kill the tiger, then you're going to have one angry tiger." Attorney Douglas T. Kendall warns: ". . . the clear risk of angering a judge outweighs the potential benefit of a successful recusal motion" *Legal Times* August 9, 2004 • Vol. XXVII, No. 32 "When Judges Behave Badly" [www. Legal times.com]. The *Courier Journal* observes: "If you ask them to step down and they don't, you probably have a hostile judge."

This case affords the Court an opportunity to determine whether the 14th Amendment establish a minimum standard of judicial conduct for actual bias disqualification. Resolution of this issue can re-affirm and clarify for the bench, the bar and broader body politic when such "systematic intimidation" violates due process or rises to the level of "deep-seated and unequivocal antagonism that would render fair judgment impossible." *Litekyv. United States*, 510 U.S. 540, 556 (1994). Anecdotal and scholarly opinion confirm that judicial antagonism and intimidation are *de rigueur* when an attorney seeks to disqualify a judge. This Court should clarify when such intimidation is beyond the pale of the Due Process Clause. This Petition presents the subsidiary question of whether post-recusal adjudication of substantive rights (i.e., vacatur) is unconstitutional per se.

Reversing the lower courts will restore due process to the underlying proceeding and reinvigorate the integrity of the judicial system. [8]

[Footnote continued from previous page]

Courier Journal On-Line "Is the Judge Biased?" "Ask the Attorney" Thomas W. McCutcheon.

[8] The perception that judges—for whatever reason—routinely accommodate more powerful interest is a cultural reality. "Most people—62 percent—believe there are two systems of justice, one for the rich and powerful, and one for everyone else." See American Bar Association "Speech Ideas/Talking Points: Independence of the Judiciary" @ http://www.abanet.org/. According to recent studies, public

Reversing the lower courts would further protect the public from impermissible judicial conduct when—for what ever reason—the state court recusal system fails or refuses to do so. Reversal would also signal this Court's absolute intolerance for egregious due process violations by the judiciary.

In the wake of *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, (2009), and prior Supreme Court precedent, this Court should reaffirm an unswerving commitment to the unbiased judicial resolution of disputes for every litigant. Deviations from the line of authority that runs from *Tumey v.*

[Footnote continued from previous page]

confidence in the judiciary is in a disturbing state of decline. See, *An Independent Judiciary*, Report of the ABA Commission on Separation of Powers & Judicial Independence (1997). In Gallup's 2007 annual "Honesty and Ethics of Professions Survey," school teachers and nurses ranked 83% and 74% respectively, whereas judges ranked 46% as having "high" ethical standards. [www.gallup.com/poll/1654/Honesty-Ethics-Professions.] Court of Appeals Judge Dolores Sloviter (3rd Cir.) cites a *National Law Journal* survey whose respondents when asked "which of the following groups played the largest role in protecting the individual rights of U.S. citizens?" only 11% answered judges. 10 *Western New England Law Review*, Vol. 10: 175 -176, citing 8 *National Law Journal*, Aug. 18, 1986, at S-3. In 1999, a national survey by the National Center for State Courts found that public trust and confidence in state courts lagged behind confidence ratings of other institutions. In an American Bar Association poll, only 32 percent of those responding said they were "extremely confident or very confident in judges." ABA, *Perceptions of the U.S. Justice System* (1999), reprinted in 62 *ALB. L. Rev*, 1307, 1320 (1999).

Ohio, 273 U.S. 510 (1927) through *Liteky v. U.S.*, 510 U.S. 540 (1994), cannot be tolerated, if the system of due process is to be credible and engender public confidence in the judiciary.

The judicial displays in this record far exceed "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, . . . sometimes display." *Liteky*, 114 S. Ct. at 1157.

In *Boston's Children First*, 244 F.3d 164 (1st Cir. 2001), Boston's Children successfully sought a writ of mandamus from the First Circuit Court of Appeals requiring District Judge Nancy Gertner's recusation premised on her *ex parte* comments to the media. Chief Judge Juan Torruella began by noting that "'if the question of whether §455(a) requires disqualification is a close one, the balance tips in favor of recusal.'" *Id.*, at 167. The chief judge went on to caution that the mandamus procedure presents "additional hurdles for the party seeking recusal. . . [and] thus requires 'a case not merely close to the line, but clearly over it.'" *Id.*

But Judge Gertner merely shared her doubts with *The Boston Herald* as to class certification in two school discrimination cases. In the one case, Judge Gertner felt: "'there was no issue as to whether [the plaintiffs] were injured . . . [Whereas] *this* is a more complex case.'" *Id.*, at 166. In stark contrast to Respondent's tirade of personal attacks,

Judge Gertner's speculative (albeit untoward) remarks and conduct pale by comparison.

Petitioners' initial mandamus was premised upon Respondent's failure to comply with 15 non-discretionary procedures established by the New York Legislature in Article 7 of the RPAPL, strictly regulating Housing Court "summary proceedings." Pet. App. 65a– 68a.[9] A stay of proceedings was issued by the New York Supreme Court upon filing of the first mandamus. Shortly after receiving the Stay of Proceedings,[10] Respondent scheduled and conducted an *ex parte* hearing with co- Respondent Riverside's counsel. *Id.* , 95a.

At this *ex-parte* hearing, Respondent characterized Petitioners' prior counsel: as "needing a psychiatrist" (*id.*, 98a); whose legal work is "crap" he "wouldn't wish . . . on [his] worst enemy" (*id.*, 99a); against whom Petitioners had "a good malpractice claim" (*id.*, 98); who is beneath speaking to "I wouldn't even—I wouldn't even speak to him off the record" (*id.*,); and someone to whom it was not worth reading "the Riot Act", "That's the sad part: Read the Riot Act to *him*?" (Emphasis added, *id.*) That this prejudicial broadside should have taken

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[9] Although only 14 rules cited at 65a through 68a, the fifteenth violation, in effect, subsumes them all: Respondent's refusal to follow RPAPL §745(1), mandating immediate trial on Petitioners' counterclaim. "All triable claims raised *shall* be tried." RPAPL §745(1).

[10] See Pet. App. at 115a.

place *ex parte* is no less alarming than its having afforded landlord's counsel considerable tactical and personal advantages *vis-à-vis* Petitioners' counsel.

Taken alone—or coupled with Respondent's subsequent threats to prior counsel with disciplinary retaliation if Petitioners' case is not "settled"—these judicial postures are constitutionally impermissible.[11] Symbiotically, they produce, as Petitioners argued below, quoting *Ward*, *supra*, a "'*situation* [i.e., 'circumstance'] in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, (and) necessarily involves a lack of due process of law." *Id.*, 112a, , or "a clash in judicial roles," (*id.*, 140a, citing *Tumey and In re: Murchison*, 349 U.S. 133, (1955). Petitioners made similar arguments to the lower Appellate Division. App. 84a - 92a. (See also Petitioners' *Tumey* discussion in Reply to the Appellate Division for leave to appeal to Court of Appeals. *Id* ., 104a -105a.)

On July 24, 2006, Petitioners moved in housing court for summary judgment on their RPL §234, costs and attorney fees counterclaim. Respondent Judge conceded Petitioners met *all* factual and statutory requirements for RPL §§234/223 protection (*id.*, 7a), but denied statutory relief, holding instead: "A counterclaim must be

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[11] Post recusal, (for no apparent reason) Respondent also threatened Petitioners' counsel with a possible contempt charges. Pet App., 121a.

denominated as such. CPLR §3011." *Id.*, 8a.[12] And even though RPAPL §745(1) mandates immediate trial on "all triable issues *raised* [not denominated]", Respondent refused to send the §234 claim to trial. On Petitioners' motion for re-hearing, Respondent ruled Petitioners must "counterclaim clearly," (Pet. App., 10a), and refused to send the counterclaim to trial in violation of RPAPL §745(1).

New York has no such "*counterclaim clearly*" rule. So to protect their right to a trial on their §234 claim, Petitioners brought the initial mandamus to compel Respondent's performance of the duty imposed upon him by RPAPL §745(1)[13]: to send Petitioners' §234 claim ("counterclaim") to trial.[14]

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[12] Civil Practice Law & Rules ("CPLR") §3011 has no such requirement. It provides in part: "there shall be *a reply* to a counterclaim designated as such." Moreover, §3011 is inapplicable in Housing Court proceedings. Civil Court Act § 907 controls by virtue of CPLR §101. Neither statute requires a counterclaim to be "denominated as such". Pet. App. 65a – 68a.

[13] RPAPL §745(1) provides in part: "all triable issues *shall* be tried."

[14] The appropriateness of Mandamus in the context of landlord-tenant "summary proceedings" has been consistently upheld by the State of New York Court of Appeals. *Brusco v. Braun*, 84 N.Y.2d 674, 621 N.Y.S.2d 291, 645 N.E.2d 724 (N.Y. 1994); and *Mennella v. Lopez-Torres*, 91 N.Y.2d 474, 695 N.E.2d 703 (N.Y. 1998). Therefore, although the respondent judge in *Mennella*, argued, "the extraordinary remedy of mandamus is inappropriate," (*id.*, 833), New York's highest court issued the writ because Housing Court judges: lack the discretionary legal authority . . . to *fashion* . . . *an additional procedural safeguard*, as a matter of policy . . . beyond the policy choices made

After service of the mandamus Stay of proceedings ordering Respondent to show cause, instead of sending the counterclaim to trial or honoring the Stay, Respondent held an *ex parte* hearing informing Riverside's counsel: "I want to resolve this lawsuit [the Mandamus] as quickly as possible . . . I have *strong personal* reasons why I don't want to have a lawsuit pending against me." Respondent *ex parte* directed co-Respondent Riverside's counsel to "draft something up" to settle the suit against Respondent Judge and "the legal fees portion of [Petitioners] claim." *Id.*, 95a – 96a. [15]

Two weeks later, the stay was still in place and the matter not settled. Respondent then summoned Petitioners' prior counsel to attend additional hearings, warning him: "Judge Wendt[16] is not your biggest fan" and:

[Footnote continued from previous page]

by the Legislature." Cf., Respondent's ruling: "It is Law 101 that a lawyer does not file [a mandamus] instead of appealing." Pet. App., 36a.

[15] The Court should compare Respondent Judge's unabashed free ranging *ex parte* colloquy with co-Respondent's counsel with his absolute refusal to discuss anything, *ex parte* with Petitioners' counsel. See Pet. App. 135a.

[16] Judge Wendt was also a co-respondent in the first mandamus action. He was named as a co-Respondent for his refusal to order that Petitioners' counterclaim be given immediate trial. Pet. App. at 44a.

> It shocks my conscience to believe that you think that the way to gain leverage [by] suing me and [Judge] Wendt. And it shocks my conscience [that] instead of appealing [you] go to 60 Centre Street [State Supreme Court]. . . . And so I have instructed my attorney to go full blast defending me in the litigation at 60 Centre Street.

Finally, Respondent warned Petitioners' prior counsel:

> I think that your lawsuit is sanctionable. And I think that your lawsuit could lead you to go to the disciplinary committee. And I not—*were I not precisely a lit [litigant]* here, I would say that your lawsuit is so frivolous and so sanctionable that it shocks the conscience. Pet. App. 81a.[17]

Respondent further stated to Petitioners' prior counsel:

> . . . I have to speak to my attorney, uh, before I file disciplinary charges against

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[17] The "shocking," "immoral," and "frivolous," action taken by Petitioners' prior counsel was filing a mandamus action seeking to compel Respondent to conduct a trial on Petitioners' counterclaim, as required by New York State law. RPAPL 745(1).

> you, uh, what's going to happen with the [mandamus]'. . . that just begins the tip of the iceberg about my thoughts, because my thoughts continue on and on...I wonder, frankly, if you're capable of doing this, what else you're capable of. ... I don't trust you even a little bit. Okay, have you heard me loud and clear? *Id.*, 56a, *fn.*, 4 cont.

Fearing disciplinary charges, prior counsel entered into a settlement on the counterclaim costs and fees issue, as well as the prior mandamus. *Id* ., 148a, ¶9. Respondent was a named party to the stipulation which resolved the counterclaim and the mandamus filed against him. *Id.*, 146a.[18] On June 20, 2007, Respondent signed a stipulation which discontinued the mandamus against him and resolved the Petitioners' counterclaim. Immediately after signing the June 20, 2007, stipulation Respondent recused himself, by writing on the file jacket words to the effect "I recuse myself." *Id.*, 122a. With prior counsel removed, Petitioners moved *pro se* for disqualification of Respondent. Pet. App. 12a.

Even though Respondent recused himself on June 20, 2007, on July 8th, 2007, he decided Petition-

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[18] Petitioners' prior counsel was Ronald Hart, Esq. The stipulation provided in part for a payment to prior counsel by co-Respondent of $190,000.00 to withdraw from representing Petitioners *id.*, 148a ¶6, and ultimately resulted in a $23,000.00 judgment against Petitioners. The stipulation also discontinued the mandamus action against Respondent. *id.*, 148a ¶9.

rs' pro se motion for disqualification. Respondent simply wrote: "Denied—This document is the most outrageous document the Court has seen in its 5½ years of service on the bench." Pet. App. 12a. This mandamus action followed.

Below, sanctions were meted out against Petitioners' subsequent counsel for, *inter alia*, Petitioners' characterizing Respondent as having "[*in essence*] brought down the gavel in his own case" (*id.*, 4a). But the figure of speech was accurate.[19] Respondent declared his desire that the prior mandamus action be resolved "as soon as possible" for "*strong* personal reasons." Emphasis added, *id.*, 96a - 97a.

In the lower courts, Respondent successfully contended mandamus was inappropriate because Petitioners "have an adequate legal remedies by . . . vacatur . . . and may pursue an appeal if that relief is denied." *Id.*, 83a. Petitioners replied that the adequate-remedy-at-law defense is inapplicable when a party seeks compliance with a constitutional duty. *Engel v. Vitale*, 18 Misc.2d 659, 191 N.Y.S.2d 453 (N.Y. Sup. Ct., Kings Co., 1959) *Engel v. Vitale*, 370 U.S. 421, (1962). *Id.*, 84a – 92a. Judge Lebovits had a constitutional duty to disqualify himself, because:

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[19] Using the prestige of his office and the weight of disciplinary threats against Petitioners' prior counsel, Respondent in effect coerced a withdrawal of prior counsel and a dismissal of Petitioners' cause of action against Respondent himself.

> . . . the Fourteenth Amendment "establishes a constitutional floor, not a uniform standard." *Bracy v. Gramley*, 520 U.S. 899, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997). Nonetheless, "the floor established by the Due Process Clause clearly requires a 'fair tribunal," before a judge with no interest in the outcome of his particular case."

Id., 905. Pet. App. 91a.

The Appellate Division found no constitutional duty, holding Petitioners "had and have other adequate remedies at law by which to seek the retroactive disqualification of the judge." *Id.*, 63a. The panel also affirmed the hearing court's dismissal of Petitioners' bias claim, absolving Respondent Judge of all impartiality, citing *Alizia Mck.*, 25 AD3d 429 (N.Y., 2006), *id*, which held: "in this case there are no circumstances that would bring the court's impartiality into question." Pet. App. 110a - 111a.

Respondent's self-proclaimed "strong personal reasons" why he wanted the lawsuit against him resolved "as quickly as possible" are never addressed or even mentioned by the lower courts. Nor does the Appellate Division acknowledge the uncontroverted fact that Respondent Judge had indeed, recused himself and later un-recused himself immediately after so-ordering the stipulation, terminating the suit against him. Similarly unanalyzed are Respondent's other statements (discussed *infra*, pp.

18-24) which objectively manifest actual bias and consistent hostility.

Petitioners also urged Respondent's disciplinary threats violated due process of law. *Id.* 138 – 141a. Again they sought redress for constitutional deprivations under *Tumey v. Ohio*, 273 U.S. 510 (1927); *Murchison*; *Ward v. Village of Mon-roeville*, 409 U.S. 57 (1972), and *Aetna Life Ins. v. Lavoie*, 475 U.S. at 813 (1986). Pet. App., 107a – 113a; 141a – 142a. Petitioners' Court of Appeals application also argued that Respondent's conduct easily falls within *Caperton*'s "objective"/"substantial potential for bias" standard. Pet App. 107a. Respondent's conduct (measured objectively) created a "substantial probability of bias" (*id.*, 107a – 108a). The Court of Appeals rejected Petitioners' argument, but failed to consider objective standards requiring recusal. This result is "not consistent with the imperatives of due process." *Caperton*, 129 S. Ct. at 2265.

This Court has admonished that only "extreme cases are more likely to cross constitutional limits, requiring this Court's intervention and formulation of objective standards." *Caperton*, 129 S. Ct. at 2265. Petitioners respectfully submit that by *any* standard, the instant facts are extraordinary featuring not only the appearance of but actual bias. In at least three respects, the facts of this case violate 14th Amendment due process as identified by this Court's precedent from *Tumey* through *Caperton*:

First
Serial, Post-Recusal Adjudication.

After his June 20th, 2007, recusal (*id.*, 147a; *fn.* 31), Respondent subsequently *un*-recused himself, serially presiding over Petitioners' rights, issuing decisions and denying their applications at least three-times post-recusal. Respondent denied Petitioners' motions for disqualification and to vacate the stipulation. During the disqualification hearing, Respondent digressed to conduct a lengthy haranguing interrogation of Petitioner W. Kyle, regarding his legal education and, for reasons unknown, accused Petitioner W. Kyle of perjury. (7-9-07, *id.*, 99a – 103a):

THE COURT: I'm going to give you one chance to tell me the truth.

MR. KYLE: About what?

THE COURT: About your going to law school, about the bar exam, about your graduating, about the University of Detroit, about—um, about, um, Regions (sic) College.[20] And if you tell me the truth, I'm going to forget this whole episode. But if you don't tell me the truth, I'm going to look into it further.

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[20] [sic.] Regent's College, London.

MR. KYLE: I think you should just "look into it further," except for dates.[21]

Respondent then in effect re-recused himself only to *un*-recuse himself and preside again. (8-13-07 *id.*, 124a – 125a). At this *second* post-recusal hearing Respondent accused Petitioners' new *counsel* of being "a liar" and "slippery" (*id.*, 37a, 42a, 53a), concluding this second post-recusal intervention by issuing two additional written decisions. Respondent scheduled a date upon which he would conduct an additional post-recusal hearing, to consider imposing monetary sanctions against Petitioners' new counsel. *Id.*, 27a. The basis for considering sanctions was Petitioners' counsel's motion to vacate the stipulation entered by Respondent, immediately prior to his June 20, 2007, recusal. *Id.*, 41a, *fn.*, 1

Respondent then apparently recused himself for a *third* time and then un-recused himself again (8-24-07), to withdraw the sanctions hearing, 62 days before—coincidently—Justice Cahn imposed sanctions, on October 26th, 2007. Respondent again recused himself but only after, *sua sponte* scheduling the case for trial on October 9th, 2007. *Id.*, 39a.[22]

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[21] Post-recusal, Judge Lebovits required W. Kyle to travel 90 minutes from lower Manhattan to Harlem to retrieve all of his educational documents demonstrating he was a law school graduate and attended Regent's College, in London. Pet. App., 101a – 103a.

[22] While some of Respondent's post recusal involvement was ministerial, most of it was not. Post recusal Respondent denied a motion to vacate the June 20, 2007, stipulation (to

Second

Respondent Admits Objective "Conflict" and "Serious Ethical Conundrum," Then Recuses Himself <u>After</u> Signing the Order Which Resolved the First Mandamus Lawsuit against Respondent

In *Caperton*, West Virginia Supreme Court of Appeals Justice Benjamin, ". . . indicated that he 'carefully considered the bases and accompanying exhibits proffered by the movants.' But he found 'no objective information . . . to show that this Justice . . . will be anything but fair and impartial.'" *Id.*, 556 U. S. ____ (2009) [p.13].

Compared to Justice Benjamin's methodology, Respondent Judge's remarks stand out in stark contrast:

> I'm in a *peculiar position* with all of this, I think, because . . . at the same time you have sued me. Uh, that—that, as far as I'm concerned, presents a rather *serious ethical conundrum* on my part because it's rare to be sued and still have a case pending before me . . . all at the same time. . .

[Footnote continued from previous page]

which he was a named Party [Pet. App. 146s]), that was signed by Respondent immediately before his initial recusal. Also post recusal Respondent denied a motion for his disqualification. *Id.*, 12 a.

Emphasis added; Pet. App. 74a.

Nothing remotely approaching this language is found in *Caperton*. In contrast to Justice Benjamin, Respondent Judge was so impressed by his own hostility (the "strong feelings engendered" [*id.*, 30a]) toward Petitioners, their attorneys "toward you and everything else" (*id.*, 59a), he recused himself. According to the lower court, Petitioners:

> . . . contend Judge Lebovits demonstrated bias and prejudice [by warning their counsel]: "Okay. What, now, Sir, are your thoughts in response to my obviously *pretty strong feelings toward you, toward your litigation* and everything else?"

Emphasis added, *id.*, 59a.

Based on that statement and the fact that Respondent was lawfully sued by Petitioners in the prior Mandamus, the motion court acknowledged that, objectively:

> Judge Lebovits correctly recognized, having been sued by the tenants in a mandamus proceeding, his impartiality towards those litigants might reasonably be questioned. Accordingly, he appropriately recused himself from the 2006 non-payment case. *Id.*, 76a.

The court's concession to the objective appearance of bias is no less impressive than Res-

pondent's: "The court . . . should recuse itself on the basis of *conflict* and because of the *strong feelings* that the [Mandamus] engendered." Emphasis added, Pet. App. 30a. In other words: "To eliminate the possibility of a conflict, the court recused itself." *Id.*, 35a. Respondent's disciplinary threats are his admission that he had a constitutional obligation to withdraw:

> . . . the statement "I am thinking about filing a disciplinary charge" was [not] meant to convey that this court would do so. The court made the statement to explain why it should recuse itself—and why it did recuse itself. *Id.*, 61a.

But the decision's glaring irony is its imposition sanctions (based on "Judge Lebovits [having already] made clear that he has recused himself . . ." [*id.*, 66a]), yet failing to mention Respondent's multiple post-recusal interventions. The lower courts completely failed to consider or even discuss the due process implications as to *pre-* and post-recusal disqualifying bias, notwithstanding the due process issues briefed by the parties. *Id.*, 1a – 61a, cf., 64a - 81a, 84a - 93a, 106a - 143a.

Third

Vituperative Conduct Directed Toward Petitioners' and their Counsel Objectively Proves Actual Disqualifying Bias

Respondent's having physically thrown the court file at Petitioners' new counsel, of course, confirms his lack of impartiality. *Id.*, 123a, 134a. Such an injudicious act occurring *post*-recusal, establishes conclusive actual bias. By the same token, Respondent's post-recusal decisions submitted in opposition to the disqualification mandamus (*id.*, 150a) are bereft of any jurisprudential weight whatsoever. Respondent's decisions are premised on non-existent facts, leveling accusations of conspiracy, theft, collusion and perjury against Petitioners and their prior counsel. The decisions underscore Respondent's deeply entrenched—not to say compulsive—bias. (See analysis made to the Court of Appeals at *id.*, 110a - 117a)

The lower courts' reading of the Due Process Clause under which this kind of judicial conduct passed constitutional muster, is nowhere apparent. Without legal analysis or reasoning, the Appellate Division found no constitutional violation and denied the retroactive disqualification. *Id.*, 61a.

Therefore, this Court should consider whether the judicial manifestations of open contempt and visceral hostility toward Petitioners, their successive

counsel and claims is constitutionally tolerable. More fundamentally, this Court may ponder whether Respondent's uniquely harsh and intemperate conduct moots any analysis under "*potential* for bias".

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to fulfill what Justice Kennedy has called "the promise of neutrality," [23] i.e., "central to . . . the idea of the rule of law [is] that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer v. Evans*, 517 U.S. 620, 633 (1996). This Petition affords the Court an opportunity to reestablish the constitutional floor of unbiased judicial resolution of disputes. This Court should include in the realm of constitutionally-impermissible conduct, actual bias generated by a judge's reaction to a recusal motion. Such conduct has been analogized by scholars and judges as having "one angry tiger," if a recusal motion fails.[24]

Given this Court's holdings that actual bias is prohibited under the 14th Amendment, an important

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[23] Seattle Times, Dec, 1998.

[24] See *fn.*, 1, *supra*. Even if the recusal motion is not well founded, a judge's reaction to the motion may create circumstances where disqualification becomes necessary.

federal question here is whether post-recusal adjudication is *per se* unconstitutional. As noted by this Court, the judges' own inquiry into actual bias, is not one that the law can easily superintend or review. But actual bias if disclosed, undoubtedly forms a basis for relief. So, if actual bias is objectively demonstrated, the Due Process Clause requires disqualification.

I: RESPONDENT'S REFUSAL TO DISQUALIFY HIMSELF CONFLICTS WITH THIS COURT'S DUE PROCESS PRECEDENTS

There is now universal consensus that when "the risk that [circumstances] engendered actual bias is *sufficiently substantial* . . . it 'must be forbidden if the guarantee of due process is to be adequately implemented.'" *Caperton*, 556 U. S. ____ (2009) [p.15], citing *Withrow* v. *Larkin*, 421 U. S. 35, 47 (1975). Yet, historically, it was always the rule that such circumstances occur when the court and a litigant were "enmeshed in prior proceedings"—usually a proceeding prior to a contempt charge, but not exclusively so. *Johnson v. Mississippi*, 403 U.S. 212 (1971).

In this case, Petitioners sued Respondent in a prior mandamus action against which Respondent failed to articulate any conceivable defense. Pet. App. 64a – 68a. Similarly, in *Johnson, (supra)*, the judge had lost a civil rights suit to Johnson just prior to trying him for contempt. With no direct nexus between the prior civil rights action and the

contempt charge, the *Johnson* court was careful to focus on the "prior relationship" between the judge and litigant. The judge,

> . . . immediately prior to the adjudication of contempt was a defendant in one of petitioner's civil rights suits and a losing party at that. From that it is plain that he was *so enmeshed in matters involving petitioner* as to make it most appropriate for another judge to sit. Trial before 'an unbiased judge' is essential to due process.
>
> Emphasis added, *Johnson*, at 216.

Johnson's so-enmeshed-in-matters-involving petitioner became one of *Caperton's* "disqualifying criteria" in which "[c]ircumstances and relationships must be considered." (*Caperton* [*supra*], *citing Murchison*, [*supra*] at 2261). *Murchison* turned on "the judge's prior relationship with the party, as well as the information acquired from the prior proceeding" because both were of "critical import" (*id.*, 129 S.Ct. at 2262).

After *Murchison*, in *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), when a lawyer verbally assaulted a judge during a prior proceeding, this Court held that due process requires "contempt proceedings . . . before a judge other than the one reviled by the contemnor." *Caperton* "reiterated", that according to *Mayberry*, "[the] rule rests on the *relationship between the judge and the defendant*."

Emphasis added, *id.*, at 2255. In other words, "the circumstances of the case *and* the prior relationship required recusal. Under *Mayberry*, for due process purposes, "[a] judge, vilified as was the Pennsylvania judge, necessarily becomes embroiled in a running, bitter controversy. No one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication." *Mayberry*, at 465.

In *this* case, the bitter, running controversy, entailed "*insulting attack[s] upon . . . integrity,*" *but* came from the opposite direction: from bench to bar. Respondent directed harsh and "insulting attacks" toward Petitioners' and their attorneys. Indeed, Respondent Judge directed the same type of insults at Petitioners themselves, ultimately hurling "insulting attacks" at Petitioners' *new* counsel. *Mayberry*'s mirror image reflects a corollary principle: "No [*judge* who] so cruelly *slander[s]* is likely to [have] maintain[ed] that calm detachment necessary for fair adjudication." *Mayberry* at 465.

Below, co-Respondent Riverside argued "Judge Lebovits was not required to recuse himself from the housing court proceeding merely because petitioners-appellants had filed a separate [mandamus] petition . . . to hold otherwise would permit litigants to engineer recusal by bring [sic] mandamus proceedings against judges." But Petitioners never claimed disqualification premised on the mere filing of the prior Mandamus. They claimed the *circumstances* created by Respondent's visceral reaction to the first mandamus produced an

"inextricable relationship" with Petitioners. Citing Justice Brennan in *Ward*, Petitioners argued the relationship in this case created ". . . a '*situation* in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, (and) necessarily involves a lack of due process of law (*Ward*., 409 U.S. at 60)." Pet. App., 112a.

Objective bias is further underscored by Respondent's striking at the very core of Petitioners' attorney-client relationship through disciplinary threats. A similar occurrence was relied on in the dissent in *Taylor v. Illinois*, 484 U.S. 400 (1988). *Taylor* upheld a preclusion sanction for an attorney's violation of discovery orders. In their dissent, Justice Brennan, along with Marshall and Blackmun, commented on an interrelated matter: the trial court's threat of disciplinary proceedings:

> . . . the defense attorney became noticeably timid once the judge threatened to report his actions to the disciplinary commission. He did not argue: "Sure, bring me before the disciplinary commission; that's a much more appropriate sanction than excluding a witness who might get my client acquitted." I cannot see how we can expect defense counsel in this *or any other case* to act as vigorous advocates for the interests of their clients when those interests are adverse to their own.
>
> Emphasis added, *id*., 437.

In other words such threats have the practical effect of disqualifying a litigant's attorney, by *de facto* judicial interference with the attorney-client relationship.

By analogy to disqualification under 28 U.S.C.A. §455(a), in *Liteky* (*supra*), Justice Kennedy observed §455(a) disqualification is "triggered by an attitude or state of mind so resistant to *fair and dispassionate inquiry* [yielding] reasonable grounds to question the neutral and objective character of a judge's rulings or findings." Accordingly, "a judge should be disqualified only if it appears that he or she *harbors an aversion, hostility or disposition of a kind* that a fair-minded person could not set aside when judging the dispute." *Id.*, 510 U.S. at 588.

On this record, the Court must conclude that no fair minded person who harbors an aversion, hostility or disposition such that he would openly state that Petitioners and/or their attorneys were guilty of fraud, conspiracy, theft, mental illness, immorality and contempt, could possibly set those feelings aside when judging this dispute. Pet. App.; 110a – 117a. Under these circumstances, due process requires disqualification, even by mandamus. But then, "few situations are more appropriate for Mandamus than a Judge's clearly wrongful refusal to disqualify himself." *In re I.B.M. Corp., In United States v. I.B.M. Corp.*, 618 F2d 923 (C.A. 2, 1980).

II. ENFORCEMENT OF THE SANCTIONS JUDGMENT IS MANIFESTLY UNCONSCIONABLE UNDER 28 U.S.C. §2106, BECAUSE THE SANCTIONS ARE PREDICATED ON SUBMISSION OF A DEMONSTRABLY FALSE AFFIDAVIT AND DISTORTIONS OF COUNSEL'S CONDUCT.

28 U.S.C. §2106 confirms this Court's power to set aside at any time any mandate which was procured by effecting a fraud on the court or which is "manifestly unconscionable." *Cord v. Smith*, 370 F.2d 418, 423 (9th Cir. 1966). This Court declared that the "deep rooted policy in favor of the repose of judgments" and the interest in finality, must yield to the overriding interest of "correcting injustices." In certain instances, such injustices are sufficiently gross to require a departure from rigid adherence to enforcement of a judgment, when enforcement of the judgment is "manifestly unconscionable." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944).

The totality of circumstances here confirms a "manifestly unconscionable" sanctions order. Petitioners inserted exclamation points in the transcript excerpts were where the audio reflected raised voices or where the language itself clearly lacked judicial temperament. Pet. App., 55a. In penalizing these allegations, the lower court relied upon the sworn statement of co-Respondent's counsel, submitted in support of the landlord's cross-motion for sanctions: "As stated in the affidavit of Lawrence McCourt Esq., counsel for Riverside, Judge

Lebovits never raised his voice and conducted himself in a calm and judicious manner at *all* times." Emphasis added, Pet. App. 55a – 57a.

Mr. McCourt was able to exploit this false generalization in support of Riverside's cross-motion for sanctions because Petitioners had not yet received transcripts of the June 4, 2007, *ex parte* proceeding. In that *ex parte* proceeding, Respondent Judge casts disparaging remarks about Petitioners' counsel. Mr. McCourt submitted his affidavit even though he was singularly privy to Respondent's injudicious, invective and insulting personal attacks about Petitioners' prior counsel, behind his back. Based, in part, on that supporting affidavit, sanctions were imposed. *Supra*, at 48 - 60a.[25]

In a truly inexplicable turn, the motion court also rested the sanctions upon Petitioners alleging Respondent "coerced an unfair settlement . . . by threatening their former attorney" but failed "to submit[ ] an affidavit from their prior counsel in support of their application. . . and failed to explain why." Pet. App. 53a. In reality, however, not one but *two* sworn statements from prior counsel were submitted. Both statements were contained in sworn answers by Petitioners' prior counsel, in Petitioners' collateral tort action against their prior attorney claiming breach of fiduciary duty. *Id.*, 148a, ¶2. In both answers, prior counsel admitted:

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[25] While only four pages of the dismissal analyze the merits (*id.*, 43a – 47a), over twice that amount, roughly 12 pages, are dedicated to meting out sanctions. *Id.*, 48a – 60a.

> Based on the threats made against this Defendant by Judge Lebovits, said threats constrained the will of the threatened party, this Defendant, beginning in the first week of June 2007, increasing and culminating on June 15, 2007. [¶80].

Prior counsel's Verified Answer went on to suggest clear additional ex parte communication between Judge Lebovits and Riverside's counsel: namely that he was warned by Larry McCourt that:

> Judge Lebovits and Wendt said [they] would seek sanctions against [me] for filing the [Mandamus against them] in Supreme Court." (¶ 33).

When the court imposed sanctions for "petitioners' obvious intent to delay" (*id.*, 59a), it cited no evidence of such delay. See *id* ., 50a – 59a. The record confirms, however, that it was *co-Respondent Riverside* who sought delay as Petitioners stood ready for trial (*id.*, 134a – 135a).

The sanctions order is clearly results-driven as it, ironically, "truncates" Petitioners' words to create a pretext to impose sanctions for "truncating." *Id.*, 55a. The order finds "Mr. Kyle accuses Judge Lebovits of . . . selling tenants' statutory protections" (*id*). But Petitioners' actual words were: "Judge Lebovits *presides over the* selling of tenants' statu-

tory protections."[26] In short, ". . . the words used in the motions were in plain English, in no way offensive in themselves, and wholly appropriate to charge bias in the community and bias of the presiding judge." *Holt v. Virginia*, 381 U.S. 131 (1965).

The spirit of the "fraud on the court" rule is applicable whenever the integrity of the judicial process or functioning has been undercut, certainly in any instance of misconduct by a party. *Shotwell Mfg. Co., v. United States*, 371 U.S. 341 (1963). A court may not sanction "factual misrepresentations" (*id.*, 59a) when none are cited. This is especially so when the only factually-incorrect assertions entered into the record were by Respondent. These factually erroneous assertions by Respondent Judge are irrefutably documented. (*Id.*, 115a – 116a). Indeed, two crucial assertions (both of which contributed to the imposition of sanctions), were later withdrawn by the New York Attorney General. *Id.*, 93a. Respondent Judge's allegation that Petitioners never moved for rehearing was wrong; and, Respondent Judge's statement that Petitioners commenced their mandamus action "more than a year after the second of those orders was issued," was equally wrong. *Id.*, 93a - 94a.

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[26] A catalogue of similar distortions of the record is contained in Petitioners' Appellate Brief (at *id.*, 69a – 79a) not one of which was ever denied by the lower courts, co-Respondent Riverside nor Respondent Judge.

Yet the sanctions order is forthrightly based on this factual inaccuracy intentionally placed in the record:

> Judge Lebovits stated on the record that, in his opinion, petitioners' decision to file a [mandamus] against him and Judge Wendt, rather than moving for reconsideration of
>
> the orders or the filing of an appeal, was "frivolous and so sanctionable that it shocks the conscience." *Id.*, 45a.

In contrast to Judge Lebovits' allegations (withdrawn for lack of factual foundation), Petitioners' *sanctioned* statements have been essentially admitted by Respondents, and were never withdrawn.[27]

Petitioners also presented a detailed analysis to the Appellate Division of Riverside's affidavits and

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[27] Other erroneous allegations were not withdrawn by Respondents even after sanctions were imposed. Petitioners had claimed Respondent violated the Supreme Court stay by conducting hearings after the stay was imposed. Justice Cahn then imposed sanctions believing Respondent Judge's contention that he "was not aware of the Supreme Court stay." Pet. App. 49a. But, on June 4, 2007, Riverside's counsel directly *informed* Respondent of the Stay of proceedings. *Id.*, 95a. See also, Petitioner's proof of Respondent's awareness, *id.*, 114a (bottom) - 115a, and *fn.*, 21. Respondent's name was inaccurately inscribed *only* on the Stay of proceedings about which he openly complains, at *id.*, 97a.

affirmations submitted in support of their motion to dismiss and for sanctions. Pet. App. 41a. The analysis demonstrated that Justice Cahn's sanction order was actually copied, in many instances *literally* word-for-word, from allegations contained in Riverside's moving papers. The fact that the sanctions order—§7804(e) was essentially *Xeroxed* from Riverside's affidavits was never refuted by either Respondent and ignored by the courts.

The sanctions in this case are inexplicable without reference to New York's recusation régime of "*systemic intimidation.*" (*People v. T & C Design, Inc.*, [*supra*]). In addition to the injustice created by Petitioners' not receiving a day in court on their counterclaim, the sanctions impose another injustice, and are "manifestly unconscionable" under 28 U.S.C. §2106. [28] The baseless dismissal of the mandamus proceeding provide another sad example of the New York courts' continued "systemic intimidation" of the

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[28] Petitioners refused "to suffer a wrong silently than to redress it by legal action." *Bates v. State Bar of Arizona*, 433 U.S. at 433 U. S. 376 (1976). That choice is costing Petitioners' counsel sanctions of $1,000.00 and the humiliating publication of his name in official State reports as "knowing[ly] engaging in frivolous conduct," by his "disrespect directed at two judges. (Pet. App. 59a).

The sanctions were twice featured on the front page of the *New York Law Journal*, (". . . the highest circulation legal daily in the United States." [law.com/jps/ny]): Beth Bar, "Attempt to Disqualify Judge Brings Sanction" N.Y.L.J. Wed. Oct. 31, 2007. Vol. 238—No. 85; and, "Attorney's Attempt to Disqualify Judge Found Frivolous, Brings Sanctions" N.Y.L.J. Mon. Nov. 5, 2007; Vol. 238—No. 88.

bar in the context of recusal. Judge Thomas F. Liotti, (*People v. T & C* [*supra*]).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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